SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 58

City of Owensboro, ... Appellant

v.

Owensboro Water Works Co., . . Appellee

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

REPLY TO PRINTED ARGUMENTS FOR DEFENDANT

MAY IT PLEASE THE COURT:

In reply to arguments in the briefs filed for the defendants it is desired to submit further discussion of the power of the city to regulate the management of the water company and to fix the prices to be paid for water by private consumers.

An act was passed by the legislature of Kentucky, which was approved March 6, 1876, entitled "An Act to reduce into one all the acts relating to the City of Owensboro." Acts 1876,

Vol. 1, pp. 551, 593, Ch. 390. Section 4 of Article 4 of this Act confers upon the common council of the city "full power to make, publish, amend, and repeal all ordinances for the following purposes, to-wit : * * * * * * *

> "Twenty-first. To make, establish, and regulate public wells, cisterns, reservoirs, and pumps, and to provide for the furnishing the city, and the inhabitants thereof, with water and gas." (p. 557.)

Afterwards, another act was passed, which was approved March 18, 1882, entitled "An Act creating a new charter for the City of Owensboro." Acts 1881, Vol. 1, pp. 817, 856, Ch. 461.

By section 10 it was provided that the common council "shall have full power to make, publish, amend, and repeal all ordinances for the following purposes to-wit : * * *

> "Twentieth. To make, establish, and regulate public wells, cisterns, reservoirs, and pumps, and to provide for the furnishing of the said city and the inhabitants thereof with water and gas." (p. 822.)

After the adoption of the present constitution of the state in 1891, which required the municipalities of the state to be classified for the purpose of organization and government and their organization and powers defined and provided for by general laws, the cities of Frankfort, Bowling Green, Paducah, Henderson and Owensboro, were placed in the third class by an act approved September 30, 1892, and an act approved June 14, 1893,

was passed for the government of cities of the third class, which contains the provisions quoted in appellant's brief on pp. 11, 12 and in appendix C, which is simply a continuation of the power to provide water and light service to the city and people of the city, given first by the act of 1876 and continued by the act of March 18, 1882, *supra*.

The power to furnish the city and the inhabitants of the city with water and gas was expressly granted to the city in 1876, and has been continued, in substantially the same terms, to the present time. By the act of June 14, 1893, (sub-sec. 5 of sec. 3290) power was given to provide the city and the inhabitants thereof with power, heat and telephone service, in addition to the *previously* given power to provide *water* and *light* service. And, for the first time, the further power was given by the last sentence of sub-section 5, to make regulations for the management of the water and other services mentioned, and to fix and regulate the price of the service to private consumers and customers of that service.

The act of 1882, supra, repeals, only "*inconsistent*" laws and "all acts and parts of acts in *conflict* with this act," (secs. 112, 120).

The rule is that in the repeal of an existing statute and a re-enactment of it at the same time, the re-enactment neutralizes the repeal, Sutherland on Stat. Const., secs. 133, 134. The old law is continued in operation.

By sec. 166 of the present constitution it was provided that all acts for the government of towns and cities should remain in force no longer than four years from January 1, 1891, and that the legislature should within that time provide by general laws for the government, of the cities and towns of the state.

By these several acts the power given by the act of 1876, to furnish the city and inhabitants with water, has been continued in force, without interruption, to the present time.

And therefore the legislature in inserting the last sentence in sub-sec. 5 could not have intended, and should not, we submit, be construed as having intended, that the power to regulate the water service and fix prices for the service, should only apply to provisions for that service to be made thereafter, but, giving fair force to the language used, in view of the power to provide the service to the city and people of the city which then existed and had existed more than twenty years, must be presumed to have intended the power to be exercised with reference to the water service then existing, as well as any future service.

It must be presumed that the legislature of the state of Kentucky in preparing and passing the act for the government of third class cities, was fully informed as to the conditions existing in each and all of them and intended to give them all such powers as were suitable for their government according to the conditions existing in each, and, that some of these cities provided water for their inhabitants by works owned and operated by the municipalities, and others were having the water supplied by water companies owned by private persons. It was wholly unnecessary to empower a city which was then operating its water plant, the city of Henderson for example, to make regulations for the management of its plant or to fix and regulate prices of water furnished to the inhabitants of that city, because, having already power to maintain and operate its plant and furnishing water to the people there, it would, by necessary implication, have the power and right to regulate the prices for the service. This sentence could, therefore, have no application

to the city of Henderson but would have force at Owensboro. And the power, so far as it related to providing water service, contained in the *first* sentence of sub-sec. 5, being one that had existed in the charters of the City of Owensboro for many years prior to the passage of the act of 1893, and by this act continued in force, it seems but reasonable to presume that the *second* sentence was intended to apply to Owensboro, and the other third class cities, that might be having water service supplied by water companies owned and operated by corporations organized for that purpose.

THE SECOND SENTENCE IN THE SUB-SECTION CONFERS UPON THE COMMON COUNCIL NEW, SEPARATE AND COMPLETE POWERS, NEVER BEFORE GRANTED, TO REGULATE THE MANAGEMENT OF WATER SERVICE, AND TO FIX PRICES FOR THAT SERVICE.

By the general principles of the common law, persons or corporations who have a monopoly, by law or by force of circumstances, and are engaged in business or have embarked their property in a business, affected with a public interest, are compelled to serve all who apply, at reasonable rates, and are not permitted to charge excessive prices for the service rendered. And it is further true, that although maximum rates for such service may have been prescribed by the legislature or by some board, tribunal or other body appointed by the legislature, they are not binding or conclusive upon the persons for whom the service is rendered. That is, if the rates charged for the service, though they do not exceed the maximum rates fixed by the legislature or other tribunal, or by contract between the municipality and the persons rendering the service, are unjust, the person for whom the service is rendered may lawfully refuse to pay them. If such rates have been exacted, the person from whom exacted

may recover back the excess above what is just, And if there is a threat to discontinue the service, or a refusal to perform it, at reasonable or just prices, the person aggrieved may have relief by injunction. Bolt v. Stennett, 8 T. R. 608 ; Allnut v. Inglis, 12 East 538 ; Lough v. Outerbridge, 144 N. Y. 271, 42 Am. St. Reps. 717 ; Chicago R. R. Co., v. Jones, 149 Ill, 361, 41 Am. St. Reps. 282 ; Griffin v. Goldsboro Water Co., 122 North Carolina 207, 41 L. R. A. 240 ; Cook v. Chicago Railroad Co., 81 Iowa 551, 25 Am. St. Reps. 512 ; Brundred v. Rice, 49 Ohio St. 640, 34 Am. St. Reps. 589.

On the other hand it is equally true that no legislature, or legislative board or tribunal has lawful authority to fix maximum rates that are unjust to the person or corporation performing the public service.

While this common law right exists in favor of the person for whom the public service is rendered, its vindication must always be expensive and few citizens can afford to enter into litigation except as they have large or very valuable interests at stake.

These considerations doubtless induced the legislature to insert in sub-sec. 5, power to regulate the management of the water service and fix maximum prices for the service.

The power was lodged in the common council and it in prescribing maximum rates, acts as an arbitrator between the company on the one hand and the people on the other. It must be just to the company and likewise just to the consumers of water. It should not attempt to invade the constitutional rights of the water company, nor should it permit the company to charge the public unjust rates or prices for the service rendered.

Considering the common law and statutory law in force in

the state, and in view of the express language of the charter, that its provisions shall receive a liberal construction, we submit that power to enact the ordinance of March 21, 1900, existed in the common council, and that the only question is whether the rates prescribed are just. That question has been fully discussed in the original brief.

Respectfully submitted,

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Attorney for Appellant.